Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

CROSS-MOTIONS FOR SUMMARY RELIEF DENIED: August 23, 2002

GSBCA 15603

CLARK COLLEGE DISTRICT 14 FOUNDATION,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Stephen G. Leatham of Heurlin, Potter, Jahn, Leatham & Holtmann, P.S., Vancouver, WA, counsel for Appellant.

Marilyn M. Paik and Joan H. Turner, Office of Regional Counsel, General Services Administration, San Francisco, CA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **NEILL**.

DANIELS, Board Judge.

Clark College District 14 Foundation (the Foundation) owns an office building in Las Vegas, Nevada, which it leases to the General Services Administration (GSA). The Foundation contends that GSA owes it more than $200,000 for having provided heating and air conditioning to the building during nonworking hours.

Each party has filed a motion for summary relief. The Foundation propounds alternative theories as to why it should prevail. We reject the first because it is based on an incorrect interpretation of lease terms. We reject the second because it is based on material facts which are in dispute. We reject GSA's cross-motion because, like the Foundation's second theory, it is based on material facts which are in dispute.

Background

GSA, on behalf of the United States Government, entered into a lease of an office building in Las Vegas, Nevada, on or about April 13, 1988. The building was to be used by the Federal Bureau of Investigation (FBI). The lease incorporated the terms of a solicitation

for offers which GSA had issued earlier. Appellant's Statement of Uncontested Facts (Appellant's Facts) ¶¶ 1, 2; Respondent's Statement of Uncontested Facts (Respondent's Facts) ¶ 1; Appeal File, Exhibit 1.

The lease required that specified temperatures be maintained "throughout the leased premises and service areas" during certain hours of operation – 6 a.m. to 6 p.m., Monday through Friday, except federal holidays.[1] In this opinion, we refer to those hours as "working hours." The temperatures were 65 to 68 degrees Fahrenheit during the heating season and 78 to 80 degrees Fahrenheit during the cooling season. Appellant's Facts ¶¶ 3, 4; Respondent's Facts ¶¶ 3, 4; Appeal File, Exhibit 1 at 23, 25. The lease stated further, "During nonworking hours the temperature shall be set to maintain 55 degrees during the heating season. No cooling is to be provided during nonworking hours." Appeal File, Exhibit 1 at 23.

The lease also required that the temperature be controlled in certain rooms at all times on all days. In one clause, the lease said, "Some areas may require independent HVAC [heating, ventilating, and air conditioning] zoning and 24-hr. availability. These areas will be designated." Appellant's Facts ¶ 7; Respondent's Facts ¶ 7; Appeal File, Exhibit 1 at 37. Elsewhere in the lease, specific rooms were in fact designated. Appellant's Facts ¶ 8; Respondent's Facts ¶¶ 3, 7, 8; Appeal File, Exhibit 1 at 5 (five rooms and an area which "will need twentyfour-hour HVAC seven days a week"), 33 (a room "with minimum HVAC to handle 1,400 BTU [British thermal units]/hour, 24 hours, 7-days/week," and another room to "be kept within 55 - 75 24 hrs., 7 days, with separate HVAC"), 37 ("Special HVAC: In addition to the HVAC requirements described elsewhere, the following are required at locations to be designated: A) 12,000 BTU/hr.-24hr.-7day . . . .").

The lease permitted the Government to "have access to the leased space at all times . . . without additional payment." However, "[i]f heating or cooling is required on an overtime basis, such services will be ordered orally or in writing by the contracting officer or GSA buildings manager. When ordered, services will be provided at the hourly rate negotiated prior to award." Appellant's Facts ¶ 5; Respondent's Facts ¶ 5; Appellant's Response to Respondent's Statement of Uncontested Facts (Appellant's Response) at 1; Appeal File, Exhibit 1 at 25. That rate was as follows: "The Lessor shall be reimbursed at the rate of $20.00 for each hour that heating and/or air-conditioning is requested by the Government and provided by the Lessor between the hours of 6:00 p.m. and 6:00 a.m. Monday through Friday and anytime on Saturday, Sunday or Federal holidays upon presentation of a properly certified invoice." Appellant's Facts ¶ 10; Respondent's Facts ¶ 10; Appeal File, Exhibit 1 at 3.

The Foundation became the owner of the building, and the lessor under the lease, on December 28, 1998. Appellant's Facts ¶ 11; Respondent's Facts ¶ 11; Deposition of Lisa Gibert (Gibert Deposition) (Apr. 25, 2002) at 12; Affidavit of Lisa Gibert (Gibert Affidavit) (May 29, 2002) ¶ 2.

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[1] Although the lease continues in force, we describe its provisions in the past tense because many of the provisions which are relevant to this case have been changed since the period of time of concern to us here.

Catherine Fletcher has been the administrative officer of the FBI at the building for the past six years. In that capacity, she is the GSA contracting officer's representative at the site. Ms. Fletcher has been working in the building since it was built. Appellant's Facts ¶¶ 12-13; Respondent's Facts ¶¶ 12-13; Deposition of Catherine Fletcher (Fletcher Deposition) (Apr. 23, 2002) at 4-5. According to Ms. Fletcher, from the summer of 1996 to March 2001, HVAC services were provided in the building twenty-four hours per day and "the building was comfortable."[2] Appellant's Facts ¶ 14; Appellant's Response ¶ 14; Fletcher Deposition at 12, 23. Ms. Fletcher testified additionally, however, that she did not know how the system was set up or whether, during certain hours of each day, the temperature was set back to a higher range, rather than fixed within the range required by the lease. Respondent's Facts ¶ 14; Fletcher Deposition at 22-23.

According to Edward Dumas, a salesman for the firm which serviced the HVAC system, a "night setback" preventing temperatures from going beyond a certain range (generally 65 to 85 degrees Fahrenheit) is essential in a hot climate like that of Las Vegas. Allowing a building to get too hot would cause undesirable effects such as plants dying, wood warping, and door security systems failing, and would make the system work excessively to reach comfortable temperatures once thermostats had been turned down. Mr. Dumas testified that the system in this building did have a night setback (other than for rooms with controlled temperatures at all times) during the period in question – January 1, 1999, through January 24, 2001. Respondent's Facts ¶¶ 33, 36, 38, 40; Deposition of Michael Edward Dumas (Dumas Deposition) (Apr. 24, 2002) at 14-17, 50-51, 58-59. Simon Niekerk, the president of the firm which employed Mr. Dumas, testified that while every HVAC system has a night setback temperature, he assumes that the system in this building was running twenty-four hours a day because "I don't remember ever having been told to put it on a time schedule." Mr. Niekerk also testified on several occasions, however, that Mr. Dumas has far more detailed knowledge about the system in this building than he does. Appellant's Facts ¶¶ 33-34; Respondent's Facts ¶ 35; Deposition of Simon Niekerk (Niekerk Deposition) (Apr. 24, 2002) at 64, 69-71, passim.

During the months in question, the HVAC system was set so that if an FBI employee, during nonworking hours, were to hit a certain button on a thermostat, the system would provide service to a particular area of the building for as long as two hours. Additional service could be had by hitting the button again, once any period of service had expired. Ms. Fletcher let other FBI employees know that they could use this feature of the system. She testified, "If they were here and they were hot, they would do that. If they were here and they were cold, they might do that." Appellant's Facts ¶¶ 16-22; Respondent's Facts ¶¶ 16-22, 44; Appellant's Response ¶ 16; Fletcher Deposition at 17-21, 23; Niekerk Deposition at 32-34, 72. Ms. Fletcher has also explained that during the period of time in question, in three particular rooms, personnel were occasionally present during nonworking hours, and they

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[2]The Foundation notes that Ms. Fletcher offered additional testimony as to her understanding of "comfortable." She stated that when the temperatures were set to between 78 and 80 degrees Fahrenheit during the cooling season – the temperature range called for in the lease – "we were very uncomfortable" because the building was "[n]oticeably hotter" than it had ever been before. Appellant's Supplemental Statement of Uncontested Facts ¶¶ 53-54; Fletcher Deposition at 24, 25.

obtained HVAC there by hitting a button on a thermostat. Fletcher Deposition at 27-28; Declaration of Catherine A. Fletcher (Aug. 8, 2002) ¶¶ 6, 9-10.

A "trend log," which is part of an energy management system, can be set up to record actual temperature readings in a space over a period of time. Although trend logs are available as standard equipment for the HVAC system which was installed in the building during the period of time relevant to this case, none were placed in this particular system. Respondent's Facts ¶¶ 46-49; Niekerk Deposition at 24-28; Dumas Deposition at 35; Gibert Deposition at 45.

By letter dated October 30, 2000, the Foundation's lawyer sent to the contracting officer an invoice, certified by the Foundation's president, in the amount of $210,480. This amount represented (a) the sum of all week night, weekend, and holiday hours from January 1, 1999, through October 31, 2000 (10,524 hours) multiplied by (b) $20 per hour. Appeal File, Exhibit 2 at 2-5; Complaint ¶ 9; Gibert Affidavit ¶ 4, Attachment. By letter dated January 15, 2001, the lawyer asked the contracting officer why she had not responded to his October 30 missive. Appeal File, Exhibit 3. By letter dated January 26, 2001, the contracting officer responded that she had not received the October 30 letter. Appeal File, Exhibit 4. The lawyer sent the October 30 letter to the contracting officer by facsimile transmission on February 15, 2001. Appeal File, Exhibit 2 at 1.

The contracting officer denied the claim on March 6, 2001. The basis for her denial was as follows:

> [The solicitation for offers] clearly sets forth the requirement that the Government must order additional overtime HVAC in advance as a condition to be liable for such services. The Government has the right to rely on this requirement and is not responsible for unrequested overtime services.
>
> Prior to January 24th, 2001, the Government did not request orally or in writing any additional overtime HVAC. It is my understanding that the previous building owner provided additional overtime HVAC **in the absence of a Government request** because the HVAC system could not be shut down in the evening and then be fully operational by the following morning. Although your client acquired the building in 1999; [sic] your client continued to provide the overtime HVAC **in the absence of a Government request** and never notified the Government that it would charge for overtime HVAC until your January 15, 2001 letter.

Appeal File, Exhibit 6.

In its notice of appeal, which was filed on June 1, 2001, the Foundation increased the amount of its claim to $237,800. This amended claim is calculated in the same way as the original claim, but covers a longer period of time – from January 1, 1999, through January 24, 2001. Complaint ¶ 11; Gibert Affidavit ¶ 4, Attachment.

Discussion

Each party has filed a motion for summary relief. We consider the motions under the following familiar standards:

> Resolving a dispute on a motion for summary relief is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. The moving party has the burden of proving the absence of genuine issues of material fact. In addition, doubts as to whether summary [relief] is appropriate are to be resolved against the moving party, and all inferences are to be drawn in favor of the nonmoving party.

Stephen E. Bryant v. General Services Administration, GSBCA 15303 (June 19, 2002) (citations omitted). A fact is material if it might significantly affect the outcome of the case. An issue is genuine if enough evidence exists that the fact could reasonably be decided in favor of the nonmovant at a hearing. Airport Building Associates v. General Services Administration, GSBCA 15535 (June 7, 2002); Trataros Construction, Inc. v. General Services Administration, GSBCA 15344 (May 31, 2002). The fact that both parties have moved for summary relief does not dictate that the Board grant one of the motions. Rather, each party's motion is to be evaluated independently on its own merits, with all reasonable inferences being resolved against the party whose motion is under consideration. Deep Joint Venture v. General Services Administration, GSBCA 14511 (May 31, 2002); Parcel 49C Limited Partnership v. General Services Administration, GSBCA 15222, 00-2 BCA ¶ 31,073, at 153,405.

We consider first one of the Foundation's theories assertedly justifying a grant of summary relief. This is that by complying with the terms of the lease, the Foundation became entitled to the moneys it claims. The lease required the Foundation to maintain certain temperatures "throughout the leased premises and service areas" during working hours. It said that if heating or cooling was required "on an overtime basis," the contracting officer or GSA buildings manager could order such services, and the Government would pay for them at a specified rate. The rate was "$20.00 for each hour that heating and/or air conditioning is requested by the Government and provided by the Lessor [during nonworking hours]." The lease required the Foundation to control the temperature in specified rooms and areas at all times on all days, and GSA has not contended that the Foundation failed to comply with this requirement. Consequently, the Foundation maintains, the Government ordered heating and cooling services during nonworking hours and must pay for them at the $20 per hour rate.

In making this argument, the Foundation relies on a decision by the Court of Appeals for the Federal Circuit, L.S.S. Leasing Corp. v. United States, 695 F.2d 1359 (Fed. Cir. 1982). The facts of L.S.S. Leasing are similar, but not identical, to those of the instant case. The lease there required the lessor to furnish heat or air conditioning during working hours. It also required the lessor to furnish heat or air conditioning during nonworking hours upon the Government's request, and required the Government to pay the actual cost of the provision of those services (up to a maximum hourly rate). One room of the building, a computer room, was to receive heat or air conditioning to maintain proper environmental conditions at all times. After a time, because unexpected conditions occurred, the parties to the lease decided that the overtime provisions were no longer fair or practicable. They modified those provisions to set a flat fee of $53 per hour for each hour of "overtime services

requested by, and furnished to, the Government . . . irrespective of the number of floors or portions worked or the number of hours worked." Id. at 1361. The lessor later realized that the computer room was being heated or cooled at all hours and claimed that it was entitled to be paid at the specified rate for providing overtime heating and cooling services to that room. The Government contended "that no overtime usage had occurred because the lessor was under an obligation to provide continuous computer room services." Id. at 1362. The Court held that the lessor's interpretation of the modification was reasonable, and that under the plain meaning of the modification, by continuing to insist on overtime heating and cooling of the computer room, the Government had constructively requested overtime services and "the overtime usage of [that computer room] falls within the scope of [the provision for payment for such services]." Id. at 1363.

In opposing the Foundation's motion, GSA calls to our attention Rincon Center Associates v. General Services Administration, GSBCA 11927, 96-1 BCA ¶ 28,126 (1995), aff'd sub nom. Rincon Center Associates v. Johnson, 108 F.3d 1393 (Fed. Cir. 1997) (table). The facts of Rincon are even closer to those of the instant case than are the facts of L.S.S. Leasing. The lease in Rincon required the lessor to maintain temperatures within a specified range during working hours, and required the Government to pay at a specified hourly rate for heating or cooling when it ordered one of those services on "an overtime basis." The lease also required that the temperature be maintained within a specified range in one computer room at all times. The lessor claimed entitlement to be paid at the specified rate for providing air conditioning to the computer room during nonworking hours, because the Government had required that service. The Government urged that the overtime rate applied only to heating or cooling in general office areas. The Board interpreted the lease as a whole so as to give reasonable meaning to all its parts and avoid conflict or surplusage of its provisions. We harmonized the provisions by holding that the lease required the lessor to furnish all utilities to the computer room as part of the rental consideration, and that the overtime clause applied only to general office areas. The Court of Appeals for the Federal Circuit affirmed our decision. Although the Court's opinion is designated as unpublished, and therefore nonprecedential, we think it worth noting that the Court's rationale was similar to our own. Not a word was said about L.S.S. Leasing in either our opinion or the Court's.

The rationale of Rincon is inherently sensible, and we apply it in the instant case. Reading the lease here as a whole, we agree with GSA that the document effectively includes in the rental rate payment for the provision of heating and cooling to the rooms and areas specified as needing heating or cooling at all times. Because heating and cooling must always be provided to those rooms and areas, it can never be required there "on an overtime basis," so payment for such services at the $20 hourly rate would be inappropriate. Although the Government, through the lease, did "request" heating and cooling services for the specified rooms and areas during nonworking hours, we consider that those hours were not "overtime," as that phrase should be understood in the context of the lease as a whole. This reading of the lease is consistent with the one we gave nearly identical provisions in Rincon.

In coming to this conclusion, we realize that the lease was not written as clearly as possible. It could and should have stated specifically that all-hours heating and cooling for particular rooms and areas was included in the base rent, and that the overtime charges pertained only to heating and cooling in general office areas. The fact that the lease was not

clear, however, does not prevent us from reading it as a whole to reach a reasonable, harmonized understanding as to its meaning.

One of the problems with the lack of clarity in the lease, as the Foundation points out, is the inclusion of the sentence, "No cooling is to be provided during nonworking hours." Taken literally, this sentence would appear to prohibit the Foundation from using a night setback during the cooling season, and from complying with specific lease provisions mandating that temperatures be maintained in certain rooms at all times on all days. It would also prevent the Government from requesting (and the Foundation from supplying) cooling services during nonworking hours. Reading the sentence in this way would be nonsensical, as it would prevent the Foundation from protecting its physical assets within the building and from fulfilling other lease requirements, and would conflict with the provisions regarding requests for overtime cooling. We think the sentence is better read in conjunction with the rest of the lease to say simply that cooling is not required during nonworking hours, except as otherwise specified.

The Foundation's reliance on L.S.S. Leasing is misplaced. In that case, the Court of Appeals was concerned primarily with giving effect to language of a lease modification, agreed to after award, which was designed to resolve a mutually disadvantageous overtime payment scheme contained in the original lease. Instead of having to harmonize provisions contained in the original version of a lease, the Court had to determine the relationship between a lease modification and a provision which was in existence at the time the modification was agreed to. Here, we must do what the Board and the Court had to do in Rincon Center – make sense of provisions contained in the original lease.

We deny the Foundation's motion for summary relief, insofar as it is based on the theory that provision of heating and cooling to certain rooms and areas at all times on all days entitled the Foundation to compensation at the specified hourly rate.

The Foundation's alternate theory in support of summary relief is that Ms. Fletcher's deposition testimony regarding FBI employees' manual operation of the HVAC system after hours demonstrates that the system was used for "almost all" of the time in question. Appellant's Motion for Summary Relief at 6; Appellant's Reply at 2, 8-9. The basis of this theory is Ms. Fletcher's testimony that during the months in question, HVAC services were provided in the building twenty-four hours per day and the building was "comfortable" – apparently more comfortable than it would have been if the higher temperature ranges required by the lease had been maintained. Even if this testimony were the only information pertinent to the matter at issue, it would not suffice to support the motion, for it does not explain whether the temperatures were set at the Government's request or the lessor's preference. If the temperatures were pleasant because the lessor volunteered to make them so, the Government cannot be found liable for the cost of the services.

Additional facts which have been presented by the parties indicate that in any event, temperatures in the building (the specified twenty-four-hour rooms excepted) do not appear to have been maintained within the prescribed range during all nonworking hours. Although the president of the firm which serviced the HVAC system assumes that the system was running at all times, his salesman Mr. Dumas, who has far more detailed knowledge, believes that the system did have night setback temperatures which were outside the prescribed range.

If Mr. Dumas is correct, the HVAC system may well have been running during nonworking hours, but not necessarily to maintain temperatures within the prescribed range. Mr. Dumas's testimony is consistent with Ms. Fletcher's statements that FBI employees, as authorized by her, the contracting officer's representative, sometimes obtained HVAC services on-demand during nonworking hours. We have no evidence as to the extent to which the Government "requested" heating and cooling during nonworking hours, however. Without proof that these requests occurred during all nonworking hours, we cannot grant the Foundation's motion for summary relief insofar as it is based on the alternate ground.

GSA's cross-motion for summary relief is based on the assumption that the Government never requested heating and cooling services during nonworking hours. GSA points to two facts in support of this theory. First, the Foundation could have monitored overtime usage through the use of trend logs, but it did not do so. Second, the Foundation has no specific or documented knowledge of any FBI employee ever having ordered heating or cooling after hours. While the first fact precludes the Foundation from offering a certain type of evidence as to overtime services, and the second indicates that the Foundation is unable at this point in the proceedings to prove the extent of its recovery, both facts taken together do not mandate our granting GSA's motion. As explained in the preceding paragraph, there is uncontroverted evidence that the Government did indeed request heating and cooling services during nonworking hours (through the pushing of thermostat buttons by FBI employees, as instructed by the contracting officer's representative). The Foundation has sought discovery as to the scope of these requests. The parties are at loggerheads regarding the Foundation's efforts to secure relevant information through discovery, but have not yet asked the Board to resolve their disputes. And the Foundation may ask for additional or amended discovery as it continues its search for relevant evidence. This evidence may be critical to the ultimate resolution of the case, so we will allow discovery of it to proceed, within confines set by the presiding judge. In the meanwhile, we deny GSA's cross-motion for summary relief.

Before closing, we address briefly two issues which have been raised by the Foundation. (1) The Foundation seeks twelve percent simple interest on the amount of its recovery. Appellant's Motion for Summary Relief at 6. If, after hearing all the evidence in this case, we direct GSA to pay any of the Foundation's claim, interest "shall be paid" not at twelve percent or any other rate selected by the Board, but rather, "at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board." 41 U.S.C. § 611 (2000). Interest shall run "from the date the contracting officer receives the claim." Id. That date is uncertain and must be determined. Although the original claim is dated October 30, 2000, GSA says that the contracting officer did not receive it until February 15, 2001. (2) The Foundation seeks reasonable attorney's fees and costs. Appellant's Motion for Summary Relief at 7. This request would be premature, even if we had granted the Foundation's motion for summary relief. Attorney's fees and costs may be sought only in accordance with the Equal Access to Justice Act, 5 U.S.C. § 504. Applications for costs under this Act may not be filed until after the final disposition of an appeal has been made. Rule 135(b) (48 CFR 6101.35(b) (2001); S. A. Ludsin & Co. v. Small Business Administration, GSBCA 13777-SBA, 97-1 BCA ¶ 28,812, at 143,729, aff'd, No. 97-1249 (Fed. Cir. Apr. 3, 1998).

Decision

Each party's motion for summary relief is **DENIED**. The presiding judge will convene a telephonic conference with the parties to schedule further proceedings in this case.

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STEPHEN M. DANIELS
Board Judge

We concur:

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ANTHONY S. BORWICK
Board Judge

_____
EDWIN B. NEILL
Board Judge